

Loren Lorenzetti v. Paul G. Enterline

C.A. No. S10C-12-020 WLW

November 7, 2011

The issues before the Court are:

Whether Defendant's motion to dismiss for failure to state a claim, which is effectively a motion for summary judgment, should be granted?

Whether Plaintiff's motion for reconsideration of his motion for a continuance should be granted?

FACTS

On November 3, 2008, Loren Lorenzetti (hereinafter "Plaintiff") retained Paul Enterline (hereinafter "Defendant") to represent him in a dispute with his former companion, Dorothea Hodges (hereinafter "Hodges"), over the return of his personal chattels¹ left behind after transfer of his real property in Dagsboro, Delaware to Hodges.² On or about December 23, 2008, Defendant obtained a temporary restraining order against Hodges on behalf of Plaintiff. The Court of Chancery scheduled another hearing regarding the temporary restraining order that occurred on January 2, 2009. At this hearing, the temporary restraining order was lifted and the case was dismissed for lack of subject matter jurisdiction with leave to file in Superior Court within 60 days.³ After threatening to terminate representation several

¹Defendant claims that his representation of Plaintiff was limited to attaining the return of personal property. This does not appear to be controverted by Plaintiff in his response to the motion. In fact, the fee agreement apparently signed by Plaintiff supports Defendant's assertion of a limited scope of representation. Def Ex. A.

²Plaintiff states that his Dagsboro, Delaware property was transferred by deed on December 10, 2004.

³Pl. Ex. 12; Def. Ex. M.

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times due to outstanding legal bills, Defendant terminated representation, and his motion to withdraw was granted by Chancellor Chandler on June 4, 2009. Plaintiff brought this *pro se* complaint for legal malpractice on January 10, 2011. On October 6, 2011, Plaintiff moved at the pretrial conference for a continuance. This motion was denied. On October 20, 2011, Defendant filed a motion to dismiss for failure to state a claim. Plaintiff opposed this motion. On October 31, 2011, Plaintiff renewed his motion for a continuance, which this Court takes to be a motion for reconsideration.⁴ Defendant opposed the motion.

Standard of Review

A Rule 12(b)(6) motion to dismiss that relies on materials beyond the pleadings shall be treated as a motion for summary judgment.⁵ Summary judgment should be granted only if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.⁶ The facts must be viewed in the light most favorable to the non-moving party,⁷ and all reasonable

⁴The Court also notes the presence of “Plaintiff’s Motion to Compel Discovery . . .” and “Plaintiff’s First Set of Interrogatories and Requests for Production . . .” The Court is missing Exhibit 3. It is unclear whether these documents should have been Exhibit 3 or whether they were mistakenly filed with this Court instead of the court addressing Plaintiff’s action against Hodges et al., C.A. No. S10C-08-007 RFS. If they were erroneously filed with this Court, Plaintiff should take the matter up with the court adjudicating C.A. No. S10C-08-007 RFS.

⁵Super. Ct. Civ. R. 12(b).

⁶ Super. Ct. Civ. R. 56(c).

⁷*Guy v. Judicial Nominating Comm’n*, 659 A.2d 777, 780 (Del. Super. 1995).

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inferences must be drawn in favor of the non-moving party.⁸ Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.⁹ However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.¹⁰ The movant bears the burden of demonstrating that a genuine issue of material fact does not exist.¹¹ Should the movant satisfy his burden, then the non-movant must prove that genuine issues of material fact exist.¹² Mere bare assertions or conclusory allegations do not create a genuine issue of material fact for the non-movant.¹³

To recover for attorney malpractice, a plaintiff must establish the following: 1) the employment of the attorney; 2) the attorney's neglect of a reasonable duty; and 3) such negligence resulted in and was the proximate cause of loss to the client.¹⁴

⁸*Lundeen v. Pricewaterhousecoopers, LLC*, 2006 WL 2559855 (Del. Super. Aug. 31, 2006).

⁹*Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

¹⁰*Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

¹¹*Lundeen*, 2006 WL 2559855, at *5 (citing *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979)).

¹²*Id.* (citing *Moore* 405 A.2d at 681).

¹³*Id.* (citing *Sterling v. Beneficial Nat'l Bank, N.A.*, 1994 WL 315365, at *3 (Del. Super. Apr. 13, 1994)).

¹⁴*August v. Fifer*, 2007 WL 80954, at *1 (Del. Super. Jan. 9, 2007) (citing *Weaver v. Lukoff*, 511 A.2d 1044, at *1 (Del. 1986) (TABLE)).

“Ordinarily, in a legal malpractice action the plaintiffs have the burden of establishing by expert testimony the specific duty of care imposed on the attorney and its breach.”¹⁵ The “common knowledge exception” dispenses with the requirement for expert testimony when the negligence is “so obvious as to be within common knowledge and experience”¹⁶ Overlooking a clear statute of limitations is usually, though not always, an example of negligence that would not require an expert.¹⁷

DISCUSSION

Because Defendant’s motion included papers outside the pleadings, it is essentially a motion for summary judgment rather than a motion to dismiss for failure to state a claim upon which relief can be granted.¹⁸ The Court addresses the motion for summary judgment first as it may be dispositive rendering the renewed motion for a continuance moot. At the heart of this motion for summary judgment, is the fact that Plaintiff has not retained an expert in an attorney malpractice action. Typically, lack of an expert is fatal to such a claim.¹⁹ This requirement of an expert is only dispensed with when negligence is “so obvious as to be within common knowledge

¹⁵*Brooke v. Elishu-Evans*, 1996 WL 659491, at *1 (Del. 1996).

¹⁶*Id.*

¹⁷*See id.* (citing *Cianbro Corp. v. Jefferson and Martin et al.*, 804 F.Supp. 784, 792 (D.S.C. 1992)).

¹⁸Super. Ct. Civ. R. 12(b).

¹⁹*Brooke*, 1996 WL 659491, at *1.

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and experience”²⁰ The case at bar is not one in which the expert requirement should be omitted for several reasons. First, Plaintiff claims that it is common knowledge that the “Court of Chancery is the proper court to hear matters pertaining to an agent’s misuse of his/her fiduciary duties under a Power of Attorney as well as lawsuits regarding Last Will and Testaments [sic].” It is unclear how this is helpful to Plaintiff as Defendant was not retained for a dispute regarding Plaintiff’s will, nor for misuse of a power of attorney. If Defendant was retained for such a purpose, Plaintiff put no evidence on the record supporting such an assertion. Second, a central grievance to Plaintiff’s claim is that Defendant did not follow his advice and pursue an argument regarding alleged misuse of a power of attorney by Hodges. It is unclear how such an argument is relevant to obtaining Plaintiff’s personal property that Hodges was willing to return but not on Plaintiff’s terms. Third, Defendant states that he was employed mainly to buy time for Plaintiff while Plaintiff went on an extended sailing trip so that Plaintiff would not lose his personal property through the disposal of it by Hodges. Plaintiff does not directly controvert this argument. Plaintiff also does not controvert that Defendant succeeded in buying him time. Fourth, even if this were a straightforward claim of malpractice, such as overlooking a clear statute of limitations, Plaintiff’s own actions complicated the situation. Plaintiff refused to be present for the temporary restraining order hearing in the Court of Chancery, he communicated with Hodges against the recommendation of Defendant, and he did not pay his attorney’s fees, putting any claim in Superior Court

²⁰*Id.*

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in peril.

Overall, without an expert to apply this set of facts to the law, it is unclear how Defendant's representation was inadequate, what damages were caused and how Plaintiff's conduct should factor into damages, and whether the alleged inadequate representation was the proximate cause of Plaintiff's damages. There is no genuine issue of material fact as to the requirement for Plaintiff to retain an expert to expound upon this legal malpractice claim. As such, this motion for summary judgment is ripe for adjudication. This Court finds Plaintiff's lack of an expert in this case to be fatal such that Plaintiff cannot meet the prima facie case for malpractice. This case is dismissed with prejudice. The motion for reconsideration of the Court's denial of a continuance is rendered moot.

CONCLUSION

Because Plaintiff did not supply an expert witness, as is typically required in cases of legal malpractice, summary judgment is granted in favor of Defendant with prejudice. As a result, the motion for reconsideration of the Court's denial of a continuance is moot.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh